TRANSAMERICA CENTER FOR RETIREMENT STUDIES®

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# TCRS 2008-10: Proposed Regulations on the Consequences of Failing to Defer Receipt of Qualified Retirement Plan Distributions and Expansion of Notice Period for Certain Notices

The Internal Revenue Service (IRS) has issued proposed regulations that would:

- expand the content of the notice required under Internal Revenue Code (Code) section 411(a)(11), dealing with the right of a participant to defer receipt of an immediately distributable benefit;
- extend the election period for waiving the Qualified Joint and Survivor Annuity (QJSA) under Code section 417 from 90 days to 180 days; and
- extend the period for distribution of the notices required under Code sections 402(f), dealing with rollover eligibility and tax treatment of distributions, 411(a)(11) and 417 from 90 days to 180 days.

## Notice of Consequences of Failing to Defer Distribution

Under the existing rules of Code section 411(a)(11), a qualified plan is not permitted to make a distribution of a participant's benefit without his/her consent while the benefit is immediately distributable and if the present value of the nonforfeitable accrued benefit exceeds $5,000. For the consent to be valid, the participant must be provided with a notice advising him/her of the right, if any, to defer receipt of the distribution. A benefit is immediately distributable at any time before the later of the participant's attainment of age 62 or the plan's normal retirement age.

Section 1102(b)(1) of the Pension Protection Act of 2006 (PPA) instructs the Secretary of the Treasury to modify the regulations regarding this notice to also require inclusion in the notice of a description of the consequences to the participant of failing to defer receipt of an immediately distributable benefit. The proposed regulations address this PPA change by requiring that this notice include the following:

- a description of specified federal tax implications of failing to defer, including the differences in the timing of inclusion in taxable income of a distribution that is not rolled over, and the differences in the taxation of any Roth contributions distributed;
- application of the 10% additional tax on certain distributions before age 59½;
- in the case of a defined contribution plan, loss of opportunity for continued tax-favored treatment of earnings;
- in the case of a defined benefit plan, a statement of the amount payable under the normal form of benefit upon immediate commencement and upon commencement when the benefit is no longer immediately distributable (assuming no future benefit accruals). If the plan is permitted to provide a QJSA explanation that does not vary based on a participant's marital status, then this statement need not vary based on marital status;
- in the case of a defined contribution plan, a statement that some investment options under the plan may not be available on similar terms outside the plan, and contact information on the general availability outside the plan of the current investment options offered under the plan;
- in the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from those that apply under the plan and contact information for obtaining additional information that applies to the participant's accounts; and
- an explanation of any provisions of the plan (or any provisions of the employer's accident or health plan) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distributions, such as plan terms:
    - under which a failure to defer may result in the participant's loss of eligibility for retiree health coverage or eligibility for early retirement subsidies or social security supplements;
    - under which the benefit of a retired participant who failed to defer may be adversely affected by his/her decision not to defer; and

- under which, in the case of a defined contribution plan, undistributed benefits that are otherwise non-forfeitable become forfeitable upon the participant's death.

The proposed regulations generally require that all of the information in the notice appear together. However, cross-referencing other sources of information is permitted, as long as the notice includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision to defer.

**Expansion of Election Period and Period for Notices**

The regulations expand the definition of an election period to waive the QJSA to up to 180 days (from 90 days) and expand the time period for notices required under IRC section 402(f), 411(a)(11) and 417 to allow these notices to be issued up to 180 days (from 90 days) prior to the annuity starting date.

The changes required by section 1102 of the PPA also apply to the parallel sections of ERISA (sections 203(e) and 205).

**Effective Date**

These regulations are proposed to be effective for notices provided (and election periods that begin) in plan years beginning on or after January 1, 2010, but in no event earlier than the first day of the plan year beginning 90 days after the date of publication of the final regulations.

Prior to issuance of the final regulations, plans that comply with these proposed regulations or the prior guidance under IRS Notice 2007-7, or which make a reasonable attempt to comply, will be treated as complying with the notice of the consequences of failing to defer.

With respect to the expanded election period and extended period for notices, plans may rely on these proposed regulations until final regulations are published.

**Comments and Public Hearing**

A public hearing on the proposed regulations has been scheduled for February 20, 2009. Written or electronic comments must be submitted by January 7, 2009.